1769. *February* 28.

HERITORS of the Parish of Elgin, *against* WILLIAM TROOP.

No 21.
Minister of a royal burgh, with a landward parish, not entitled to designation of a manse upon the statute 1663.

THE parish of Elgin, beside the royal burgh of that name, contains a large district to landward. The cure is served by two ministers, neither of whom, at least since the Revolution, have enjoyed either a manse or a legal glebe.

In 1764, the presbytery, after summoning the heritors, ordered esimates of the expense of a manse, and contracted for the execution with William Troop mason in Elgin, to whom they ordained the money to be paid by the heritors, according to the proportions at which, by the decree of designation, they had assessed their respective lands.

A charge given upon this sentence being suspended, it was *pleaded* for the Heritors, That ministers of royal burghs have no title to insist for designation of a manse upon the statute 1663.

In support of this proposition, it was *observed*, That, in the most ancient periods of our church, the building and repairing of the manse were burdens incumbent upon the churchmen themselves. This appears from the 13th canon of a provincial council held in Scotland in the reign of Alexander II. *anno* 1249.

In like manner, after the Reformation, the act 1563, c. 72. provides that the popish parson or vicar should be obliged to yield up to the protestant minister serving the cure, 'the principal manse, or sa meikle thereof as sall be fundin 'sufficient for staiking of them, or that an reasonable and sufficient house be 'bigged to them, beside the kirk, be the parson or vicar.' This provision is enforced by the 48th act of the Parliament 1572, and by 1592, c. 118. extended even to such abbeys and cathedral kirks, 'quhair na uther manse nor gleib, 'pertaining to parson or vicar was of before; swa that the ministers presently 'admitted, or quhilkis hereafter sall happen to be admitted, to the office or 'cure of the ministry, within the said kirk, sall have an sufficient manse and 'dwelling-place within the precinct of the abbay quhair he servis.'

From these statutes it appears, that the burden of building manses lay solely upon the ecclesiastics; nor is there the least trace of any obligation imposed, either upon the heritors, or upon the parishioners for that purpose. With regard to repairs, it is obvious, that they must have been a burden upon the incumbent, since no other person is made liable for the expense of them; and so this point is fixed by the after statute, 1612, c. 8.

Thus matters stood from the earliest period of the Scottish church, down to the year 1644, when an act passed, whereby presbyteries were empowered to design manses and glebes out of kirklands, or, in default of them, out of temporal lands; Borrowstoun kirks being always excepted.

This exception is taken away by a subsequent statute, 1649, c. 45. which 'ordains the heritors of the parish, at the sight of three ministers and three

'ruling elders, to be appointed by the presbytery, to build competent manses 'to their ministers, the cost and expense thereof not exceeding L. 1000, and 'not being beneath 500 merks; and that burghs, and heritors of the landward 'parts of the parish, provide also competent dwelling-places and houses for 'their ministers, the sum not being above or beneath the sums above expressed.' No 21.

The two last-mentioned statutes fell under the general act rescissory 1661, and matters returned to the footing upon which they stood by 1612, and former enactments; and as, prior to the two rescinded acts, there was no obligation upon the heritors to build manses, it is clear, that, were this cause to be determined by these ancient statutes, the minister of Elgin could not compel the heritors to build a manse for him.

But the matter does not rest here: The act 1663, c. 21. contains sundry provisions for the benefit of ministers, and is declared, '*as to the manses*, to have 'force, as the same had been made and dated the 14th of March 1649.' It is plainly copied from the rescinded act of that date: It is copied from it in so far as relates to ministers of country parishes; but, with respect to ministers in burghs, it is entirely silent, and *ex proposito* omits to renew the abrogated provision in their favour.

As, in these circumstances, the omission cannot be considered as accidental, there is no room to doubt that the intention of the Legislature was to exclude ministers of royal burghs from the benefit of manses. And so it was expressly found in the case of the minister of Dunfermline, observed by Falconer, 30th June 1750. No 19. p. 8504.

Pleaded for the charger, The statutes 1563, 1572, 1592, and 1594, are expressed in general terms, and necessarily import, that the minister of every parish, without distinction, was entitled to a manse.

Before the Reformation, the burden of building and repairing manses lay upon the parishioners. The veneration in which the clergy were then held, was too great to require any positive enactment of the Legislature, whose interposition indeed was in a great measure rendered unnecessary, by the almost unbounded jurisdiction enjoyed by the church, in every matter where the interest of her servants was concerned.

It appears from the books of Assembly, that many of the first reformed ministers had no larger allowance than L. 20 or L. 30 Scots; and 200 merks was among the highest stipends. Upon such a pittance, it were absurd to suppose, that the incumbents could have been subjected to the new obligation of building or repairing their manses.

The introduction of Episcopacy, a favourite plan of James VI. was exceedingly disagreeable to the nation in general. Among other expedients devised for reconciling them to that measure, the statute 1612, c. 8. entitled, 'An act 'anent repairing bishops manses,' was passed; by it both heritors and parishioners were freed from the building or repairing of manses, and the burden laid upon the incumbent himself.

No 21. It would appear, that this statute had not long continued in observance, with respect to the inferior clergy at least, if ever designed to extend to them; for, by a decision 11th February 1631, Minister of Inverkeithing against Ker, No 4. p. 8497. it was found, That the minister 'might either deal with the parishioners for bigging a manse to him, or *pursue them therefor, prout de jure*, or otherwise big his own manse, the expense whereof would be refunded to his executors by the next incumbent, conform to the act of Parliament.'

Be this as it will, as, prior to the act 1612, every minister, whether of a country parish, or of a royal burgh, was entitled to a manse, so no exception is contained in that statute; and that, *de facto*, posterior to it, ministers of royal burghs did enjoy manses, is clear from another decision, 24th July 1629, Nairn *contra* Boswell, No 15. p. 5137.

That judgment, given in the case of a glebe, and *a fortiori* applicable to the case of a manse, is supported by the act 1644: For, since in order to give an exemption to royal burghs, the aid of a statute was necessary, it follows, that, prior to that enactment, the ministers of royal burghs were *in pari casu* with others. The exception, however, of borrowstoun kirks was soon recalled, and the ancient common law, whereby all ministers, without distinction, were entitled to have manses built for them, restored by the statute 1649, c. 45. Such being the case, the act rescissory made no variation in this respect, but, by abolishing both the late acts, did in effect leave matters in the same situation as if the statute 1644 had never been enacted, or the statute 1649 had continued unrepealed.

The former law, by which ministers, even of royal burghs, had right to manses, being restored, there could be no occasion for an express enactment, to establish that right upon as broad a foundation as it stood prior to the date of the rescinded statutes. The principal view of the act 1663 was to vest in bishops the jurisdiction formerly exercised by presbyteries; and it would not be surprising, though less attention had been paid to other accidental considerations. But, even in these circumstances, the act itself shows the intention of the Legislature, that ministers of royal burghs, at least in the case where there is a landward parish annexed, should be entitled to manses. For not only are the words general, and without exception, but, in relation to glebes, it is expressly provided, 'that in all designations of glebes incorporate acres, in village or town where the heritor hath houses and gardens, the same shall not be designed, he always giving other lands nearest to the kirk.' Hence it follows, that ministers of burghs are entitled to have lands designed for a glebe; and, if so, they must have equal right to the lesser benefit of a manse.

The obligation of a constant residence, is equally strong upon the ministers of royal burghs as upon others; and although, from particular circumstances, some of them may chance to enjoy larger stipends, their trouble must necessarily be increased with the greater number of their parishioners, and the expense of living must be more considerable.

Arguments taken from borrowstoun kirks, or parishes within burghs, will not apply to the present case, where the parish is not confined to a burgh, but consists of a large district to landward, which happens to comprehend a burgh within it. It would sound strangely to say, that by the erection of a burgh in an extensive parish, the minister, at the same time that he had his labour increased, should forfeit one of his most valuable rights; and, in more cases than one, ministers of royal burghs have been found entitled to manses upon this very footing, that there was a landward parish annexed. No 21.

Replied for the Heritors, The charger's whole argument proceeds upon the supposition, that, prior to the Usurpation, heritors were subjected, at common law, to the burden of building or repairing manses. But this is a mistake. It is true indeed, that the ministers of certain burghs have got right to manses, by coming in place of the popish clergy. These may derive assistance from inveterate use, and to them the decisions quoted must be referred. In the same manner might perhaps be explained the words of the statute 1663, referred to by the charger, though, by the expression of villages and towns, burghs of regality or barony ought properly to be understood.

THE LORDS determined the question upon the point of law, and found, That the minister of Elgin was not entitled to insist for the designation of a manse, upon the statute 1663.

Reporter, *Barjarg.* For the Heritors, *Lockhart, W. Mackenzie.*
For the Charger, *David Dalrymple, Geo. Wallace.*

G. F. *Fol. Dic. v. 3. p. 398. Fac. Col. No 90. p. 163.*

Similar decisions were pronounced in the case of the Minister of Montrose, 29th January 1779, Nisbet against Magistrates of Montrose, and in the case of South Leith, Scot against Earl of Moray; see APPENDIX. See also N 23. p. 8513.

But it may be doubted, whether the decisions in all these cases did not rest upon special circumstances; and perhaps the general point may be considered as not yet settled.

Fol. Dic.

1778. *July* 2.

Sir LAURENCE DUNDAS *against* ARTHUR NICOLSON, and Others.

No 22.
The superior not liable to be assessed for the expense of building the manse.

THE presbytery of Lerwick in Zetland assessed the parish of Nesting for rebuilding the manse, and proportioned the assessment among the heritors according to their number of merk lands.

Messrs Nicolson and Hunter, who held their lands in the parish, feu of Sir Laurence Dundas, for payment of a considerable feu-duty, having objected to